



Fair Up or Down Vote

May 16, 2005

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Noteworthy

“I have sought to address Democrats’ grievances while holding true to the core principle of an up-or-down vote. So far, my Democrat colleagues have rejected all efforts at compromise, and continue to insist on a new, 60-vote standard.” **Senator Frist**, Op-Ed, “It’s Time For Up-Or-Down Vote,” *USA Today*, 5/16/05

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“Democrats never should have filibustered all of those judges that they did. It was an abuse of the filibuster. I think they recognize that.” **Senator McCain**, ABC’s “This Week” 5/15/05

“We’ve been talking continuously on this. Senator Frist has been talking to Senator Reid. I’ve been talking to Senator Reid. What we’d like to do is to get back to the way the senate operated quite comfortably for 214 years prior to the last congress, where admittedly it was possible to filibuster for the purpose of defeating judicial appointments, it’s just that it was never done.” **Senator McConnell**, Fox News’ “Fox News Sunday,” 5/15/05

“If it’s necessary to change the rules to assure an up or down vote, sure ... We have voted up or down on the judges that came before us when we had a Democratic president, and I think that’s the way to handle it.” **Senator Bond**, “Kansas Senator Adds His Doubts About ‘Nuclear Option’ To Eliminate Filibusters,” *Knight Ridder*, 5/15/05

“It’s important for Senators to get out of the business of denying vote on judges because a senator would have appointed somebody else if he were president.” **Senator Talent**, “Kansas Senator Adds His Doubts About ‘Nuclear Option’ To Eliminate Filibusters,” *Knight Ridder*, 5/15/05

“There’s no sign of [Democrats’ obstruction] ending ... We’re kind of at the end of the string. I don’t know what else we can do [other than the constitutional option].” **Senator Brownback**, “Kansas Senator Adds His Doubts About ‘Nuclear Option’ To Eliminate Filibusters,” *Knight Ridder*, 5/15/05

“I tend to be a traditionalist, and the right of unlimited debate has been a hallmark of the Senate since its inception ... Without question, though, I am strongly opposed to the use of the filibuster to block judicial nominations.” **Senator Warner**, CNN Website, www.cnn.com, Accessed 5/16/05

It's time for up-or-down vote

USA TODAY
By Senator Bill Frist

All 100 members of the U.S. Senate will soon decide a basic question of fairness. Will we permit a fair, up-or-down vote on every judicial nominee? Or, will we create an unprecedented 60-vote requirement for the confirmation of President Bush's judges? I sincerely hope that it is the former.

Our Constitution grants the Senate the power to confirm or reject the president's judicial nominees. In exercising this duty, the Senate has always followed a careful and deliberate process of examining the nominees through hearings, discussing their merits in committee, debating them in the full Senate and then coming to an up-or-down vote on the Senate floor. We investigate, we debate, and then we decide.

Beginning in 2003, however, the Senate stopped deciding. Until then, every judicial nominee who cleared the Senate's committee process received the courtesy of that vote. Some nominees were rejected on the floor, but they always received that vote. A few years ago, however, Senate Democrats began blocking final votes on judicial nominations. They began to filibuster.

These filibusters of judicial nominations injure the administration of justice and our nation's political culture. Some courthouses have sat empty for many years, even though a bipartisan majority of senators stands ready to fill the vacancies by confirming the president's nominees. And as every American knows, the political wrangling over this issue has become less and less civil with every passing day.

It is time to vote. As Senate majority leader, I have tried for more than two years to find common ground with my Democrat colleagues. I have offered to guarantee as many as 100 hours of debate for every judicial nominee, far more than has ever been necessary for any nominee in the past. I have offered to guarantee that no nominee ever becomes unjustly stalled in the Judiciary Committee, as many Democrats believe happened in the late 1990s.

In other words, I have sought to address Democrats' grievances while holding true to the core principle of an up-or-down vote. So far, my Democrat colleagues have rejected all efforts at compromise, and continue to insist on a new, 60-vote standard.

Such a position is unacceptable. President Bill Clinton's nominees required only 51 votes to be confirmed. Why should George W. Bush be treated differently? Until this president took office, Democrats and Republicans alike were firmly opposed to all filibusters, and said so repeatedly. We had a tradition based on mutual respect and restraint.

It is my hope that, after the Senate has decided this question, we can return to a greater spirit of bipartisanship and meet other pressing priorities. At the same time, this is an issue that must be addressed, and soon.

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EDITORIAL: How We Got Here

Why Republicans can't let the judicial filibuster succeed.

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Barring a surprise last-minute deal, this week Senate Majority Leader Bill Frist will ask for a ruling from the chair--Vice President Dick Cheney presiding--that ending debate on a judicial nominee requires a vote of a simple majority of 51 Senators, not a super-majority of 60. The nuclear option--aka the "constitutional option"--will have been detonated. Judicial filibusters, R.I.P.

This will not be the world's greatest deliberative body's greatest moment, and the only thing we know for sure about what will happen next is that the reputation of the Senate will suffer. It's a shame it has come to this. But at this point it would be worse if Republicans let a willful minority deny the President's nominees a vote on the Senate floor.

On the eve of this brawl, it's worth recalling how we got here. Our own choice for what started the modern bitterness would be 1987 and the Robert Bork fight. There were previous court battles--Abe Fortas and Clement Haynsworth come to mind--but the trashing of such a widely respected jurist marked that date as the one when nominations became political campaigns. During the Clinton years some GOP Senators returned the favor by delaying or blocking individual nominees. But even when Republicans had a Senate majority, there was nothing comparable to the demolitions of Mr. Bork or Clarence Thomas.

The judicial filibuster of the last two years marks another political escalation--this time twisting a procedure used historically for the most important legislative debates into an abuse of the Senate's advise-and-consent responsibility. Had their nominations been allowed to go to the floor, every one of the 10 men and women filibustered in the last two years would have been confirmed.

The audacity of the Democrats' radicalism is illustrated by the breadth of their claims against the nominees. It isn't just one nominee they object to; it's 10, and counting. It isn't just abortion they're worried about but the entire range of constitutional law.

Priscilla Owen is said to be a judicial "activist" for a decision interpreting Texas's law regarding parental notification of teens seeking abortions. Janice Rogers Brown is "against" affirmative action and speaks bluntly in public. Brett Kavanaugh is portrayed as a radical for defending executive privilege. William Pryor is hit on the First Amendment. Richard Griffin is "anti-union" and "anti-worker." William Myers is "hostile" to the environment. Every one is labeled an "extremist" and unacceptable no matter their experience or their "well qualified" ABA rating.

This also marks a political escalation in reaching below the Supreme Court to the circuit courts of appeal. These nominations have long been considered more or less routine, the place where the

Scalias, the Borks and the Ruth Bader Ginsburgs could serve the country and prepare for the day they might be nominated to the High Court. With the filibuster, Democrats are denying an elected President the ability to fill out even the lower courts.

They are going to such bitter lengths, we suspect, precisely because they view the courts as their last hold on federal power. As liberals lost their majority status over the past 30 years, they have turned increasingly to the courts to implement their political program. If Democrats succeed in blocking these nominees, they will feel vindicated in their view that judicial activism pays. They will also conclude that Senate obstructionism works, and so will dig in for more of it.

We know some conservatives worry about undermining a process that protects minority rights. But the filibuster is a Senate rule that has been changed frequently over the years, while the right of a President to nominate judges is written into the Constitution. Only one judicial nominee--Fortas for Chief Justice--has ever arguably been filibustered and that was for the purpose of taking a straw vote on his prospects, not to deny him an up-or-down vote on the Senate floor. Democrats who point to other judicial filibusters are deliberately confusing the distinction between a filibuster and a vote for "cloture," or to end debate. (The best exposition on this subject is a 2001 paper by Richard Beth of the Congressional Research Service.)

As for Republicans who want to preserve the option of filibustering a future nominee, it'd be just as wrong for them to do so. And Democrats willing to use the filibuster to block judges would not have any qualms about using the nuclear option themselves to kill a filibuster in the future. Ted Kennedy and Chuck Schumer believe in the "whatever it takes" school of politics.

This is at its core a political fight, and elections ought to mean something. Republicans have gained Senate seats in two consecutive elections in which judicial nominations were among the most important issues, including against the Senate Minority Leader. The one Democrat from a red state who won last year, Ken Salazar of Colorado, did so by promising to oppose judicial filibusters; he now seems to have changed his mind after sipping the Beltway's partisan punch.

Perhaps the coming showdown will lead to more political bitterness, but we doubt Democrats will be able to follow through on their pledge to shut down the Senate; the public wants other things done. And who knows? If Democrats can't succeed any longer in legislating through the courts, maybe they'll even return to trying to win power the old-fashioned way, through elections.

Minority Rule Turns Good Government on Its Head

May 16, 2005

By Bruce Fein,

Special to Roll Call

Contrary to what Nan Aron writes in "What's Wrong With President Bush's Gang of Seven" (Guest Observer, May 10), the controversy over judicial filibusters is not about President Bush's nominees.

Senate Democrats and private groups are constitutionally entitled to assail them as unfit. Under the First Amendment and the Speech or Debate Clause, Democrats may seek to persuade a Senate majority to reject a candidate, as they did with Supreme Court nominee Robert Bork. Indeed, Senate Majority Leader Bill Frist (R-Tenn.) offered them on April 28, 2005, a minimum of 100 hours of debate for each of Bush's judges. Minority Leader Harry Reid (D-Nev.) summarily scorned the offer.

Neither the Constitution nor democratic theory, however, empowers a political minority to thwart a Senate confirmation vote to avenge its inability to convince a majority. Tolerating rule by the minority turns government by consent of the governed on its head.

The legitimate way for Democrats to defeat Bush's judicial nominees is by capturing control of the Senate, an opportunity that arrives like clockwork every two years. That has been the understanding and practice for more than two centuries.

In 1986, for example, President Ronald Reagan elevated Associate Justice William Rehnquist to chief justice and appointed Antonin Scalia as associate justice with a Republican Senate. The twin appointments generally dismayed Democrats. Their dejection found expression not in judicial filibusters but rather in regaining control of the Senate, whereupon they rejected the 1987 nomination of Bork.

President Franklin Delano Roosevelt appointed eight Supreme Court Justices and more than 80 percent of the entire federal judiciary. Virtually all were stalwart New Dealers who had championed FDR's infamous court-packing legislation. Republicans bowed to the political will of the nation on judges, and eschewed obstructionist tactics in favor of rebuilding the party.

Ms. Aron's tocsin against Bush's judges has proved unconvincing because it is counterfactual, incredulous and insincere. Texas Supreme Court Justice Priscilla Owen, for example, is indicted as "so extreme, insensitive and politically motivated," as to have provoked criticism from conservatives and colleagues, even Attorney General Alberto Gonzales, an erstwhile justice who served with Owen in Texas.

But this indictment is preposterous. The liberally inclined American Bar Association unanimously awarded Justice Owen its premier "well qualified" rating. Democratic Senator Patrick Leahy (Vt.) has acclaimed the ABA as the "gold standard" of judicial vetting.

Democratic Senator Charles Schumer (N.Y.), a stentorian detractor of Bush's judges, has vouched for Owen's impeccable abilities: "I don't think there is any question about your legal excellence. You have had a distinguished academic and professional career." In November 2000, Justice Owen predictably was endorsed in her re-election bid by every major newspaper in Texas and attracted a staggering 84 percent of the vote.

Aron faults Owen for allegedly ignoring a Texas law enabling mature minors to bypass parents and obtain an abortion with court permission. But the justice sustained a judicial bypass in several cases.

She parted company with then-Justice Gonzales in one instance of bypass over whether deference should be showed to a trial judge's fact-finding regarding maturity. Aron falsely asserts that Gonzales decried Owen's dissent as an "unconscionable act of judicial activism."

The attorney general has expressly and repeatedly denied that canard. He testified during his confirmation hearing: "My comment about an act of judicial activism was not focused at Owen; it was actually focused on me. What I was saying in that

opinion was that, given my interpretation of what the legislature intended, it would have been an act of judicial activism not to have granted the bypass in that particular case. If someone like Judge Owen in that case reached a different conclusion about what the legislature intended, it would have been perfectly reasonable for her to reach a different outcome."

Aron faults Owen for voting to dismiss a case for improper venue and against liability of an employer for a tort committed by an independent contractor. Both opinions were grounded in basic Texas law.

Aron's insincere opposition reaches its apogee in her weeping over the fear that Owen will be a "results oriented" jurist. Is this believable coming from an organization whose icons include Chief Justice Earl Warren and Associate Justices William Brennan, William Douglas and Harry Blackmun? All of four celebrated "penumbras," "emanations," "fairness" and "evolving standards of decency" as their lodestars, and demoted the Constitution to no more than an extra in a Cecile B. DeMille extravaganza.

As Justice Oliver Wendell Holmes remarked about freedom of speech, the best test of Aron's views on Bush's judges are their ability to succeed in the marketplace of ideas. In this case, that means on the floor of the Senate.

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